91-1303

Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TRIPLE M DRILLING COMPANY, GARY MORRISON, CAROLYN KATO, CHARLES F. LATHROP, JR., AND CLEO SHOWS,
Petitioners,

v.

THE FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK HOUSTON, NATIONAL ASSOCIATION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

IN A CASE OF LENDER LIABILITY, DOES A WRITTEN SUBORDINATION AGREEMENT NEGOTIATED TO EXTEND THE DUE DATE OF AN EXISTING CREDIT AGREEMENT AND INTEGRATED WITH THE CREDIT AGREEMENT, BAR THE FDIC'S "SUPER DEFENSES" UNDER *D'OENCH, DUHME V. FDIC*, 315 U.S. 447 (1942), OR 64 STAT. 889 (1950)?

II.

DID THE COURT ERR IN GRANTING SUMMARY JUDGMENT AGAINST THE INDIVIDUAL PETITIONERS ON THE ISSUE OF THE PERSONAL, RATHER THAN DERIVATIVE, NATURE OF THEIR CLAIM WHERE THE COURT FAILED TO VIEW THE SUMMARY JUDGMENT EVIDENCE IN THE LIGHT MOST FAVORABLE TO THEM?

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

TRIPLE M DRILLING COMPANY, GARY MORRISON, CAROLYN KATO, CHARLES F. LATHROP, JR., AND CLEO SHOWS,

Petitioners,

vs.

THE FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR MBANK HOUSTON, NATIONAL ASSOCIATION

Respondent.

****

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

****

PETITION FOR WRIT OF CERTIORARI

The Petitioners TRIPLE M DRILLING COMPANY[1], GARY MORRISON, CAROLYN KATO, CHARLES F. LATHROP, JR., and CLEO SHOWS respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on November 19, 1991.

[1]There are no parent or subsidiary companies involved.

OPINIONS BELOW

In a Memorandum and Order entered on August 9, 1990, United States District Judge Sim Lake entered a summary judgment (FED. R. CIV. P. 56) against Triple M Drilling Company ("Triple M") on some, but not all, of its claims. At the same time, he entered summary judgment against Gary Morrison, Carolyn Kato, Charles T. Lathrop, Jr., and Cleo Shows ("the individuals") on all of their claims. Judge Lake's decision is unpublished and is reproduced here as Appendix "B". After effecting a severance pursuant to the provisions of Rule 54(b) of the Federal Rules of Civil Procedure, Judge Lake, in a ruling from the bench, subsequently entered summary judgment against Triple M on the remaining issues. The official transcript of the proceeding containing his opinion is reproduced as Appendix "C". The final judgments of the District Court are reproduced as Appendices "D" and "E".

On November 19, 1991, in an unpublished *per curiam* opinion, a panel of the United States Court of Appeals for the Fifth Circuit affirmed Judge Lake. The opinion is reproduced as Appendix "A".

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its Judgment affirming the District Court on November 19, 1991. There was no petition for rehearing.

This Court has jurisdiction to review that Judgment pursuant to 28 U.S.C.A. § 1254(1) (1966).

STATUTES INVOLVED

64 Stat. 889 (1950):

(e) * * *

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

STATEMENT OF THE CASE

One critical fact dispute in the District Court existed and should have prevented the grant of summary judgment. Is there a written agreement sufficient to overcome the invocation of FDIC "super defenses"? Petitioners conceded below, and concede in this Court, that, if the Subordination Agreement at issue does not constitute such a document, they

have no case. If it does, they are entitled to a trial.[2]

Triple M Drilling Company was a Houston, Texas oil and gas drilling contractor. The individuals -- Gary Morrison, Carolyn Kato, Chuck Lathrop, and Cleo Shows -- were founders, officers, directors, or employees of Triple M. In the oil patch, they were the persona of the company.

At the urging of their banker, Triple M started a revolving line of credit with MBank Houston to finance receivables from the operators for whom it was drilling wells. The line was secured by operating revenue and shareholder equity. It was raised several times, eventually to $750,000. A commercial revolving credit note in that amount was executed. It was to mature and come due on March 3, 1987.

Shortly after beginning operations in 1985, Triple M bought two drilling rigs from United States Steel's Oilwell Division ("Oilwell"). Oilwell financed the purchase, with Triple M giving a lien on receivables from the rigs as security.

At the zenith of its operations, Triple M had five land rigs working and was planning the acquisition of four more land and one offshore rig. They were drilling for large operators like Chevron, Sohio, and Amoco and for small independents with unfinancable names -- wildcatters -- as well.

The oil business, from exploration and production through delivery and sale of refined products, is fraught with risks. For the driller, a major one is geology. When drilling a turnkey well -- that is, one at a fixed price -- if a

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[2]The recited operative facts are found in the Joint Pretrial Order (Docket Nos. 31 and 31A, "Doc. No."), the records of MBank, and the record below.

section of pipe breaks and the drill head has to be fished out; if the mud needed to equalize drilling pressure is inadequate and there is a blowout; or if impenetrable rock appears where the studies and reports said there was shale, the drilling contractor could be spiraling into a financial abyss. Another risk for the driller is the continuing ability of an operator to pay for the well.

In the early winter of 1986, one of Triple M's operators reported that it was not timely able to pay in full for a completed well. This situation occasioned a plan to restructure Triple M's debt service for 1987. Part of the plan was an equity infusion from shareholders. In December 1986, they contributed $400,000 cash, pledging an additional $600,000, and negotiations with MBank began.

Ultimately, MBank agreed that if Oilwell would subordinate the lien it had on Triple M receivables it would extend the $750,000 note through December 31, 1987. A written Subordination Agreement dated March 25, 1987 reflecting this purpose, but without the date, was approved by MBank's loan committee, executed by all parties, and has been continuously since the date of its execution, an official MBank record. (Doc. No. 22, Tab 10, to the Record Excerpts below)

In May 1987 a Triple M turnkey drilling job in Louisiana got stuck before reaching the contract depth. Gary Morrison and Chuck Lathrop renegotiated the contract price with the operator so Triple M would be paid for additional work, but when they reported the situation to MBank, the bank acted precipitately. The next day, a Friday pay day, with no request and no notice, MBank for the first time treated the note as overdue and offset Triple M's operating account -- over $330,000 -- to pay on it. Rig hands and suppliers went unpaid, and MBank notified all of Triple M's

operators to make future Triple M payments directly to the bank. The word was out in the oil patch that Triple M's checks were hot checks. Triple M, which had survived $8.00 a barrel oil, was killed by MBank; the individuals were ruined; all were through in the oil business. A Chapter 11 bankruptcy petition was filed the Monday following the offset.

How The Federal Question Was Presented

The Bankruptcy Court authorized a suit against MBank for non-federal contract and tort claims which was filed in the Texas courts. The individuals intervened alleging various commercial tort claims personally accruing to them from MBank's conduct. Triple M and the individuals certified the case ready for trial in December 1988, but MBank delayed -- until it was declared insolvent and the FDIC became its Receiver. The FDIC acted only in its capacity as receiver, not in its corporate one. Pursuant to the provisions of 80 Stat. 1055 (1966), 12 U.S.C.A. § 1819 "Fourth" (1989) and 28 U.S.C.A. § 1446 (1973 and Supp. 1991), the suit was removed to the United States District Court for the Southern District of Texas.

The written Subordination Agreement negotiated among the parties described above was submitted to the District Court in opposition to the summary judgment motion. The argument based on this writing for the inapplicability of either *D'Oench, Duhme v. FDIC*, 315 U.S. 447 (1942), or 64 Stat. 889 (1950) was likewise presented to the Courts below. (Doc. No. 47)

REASONS FOR GRANTING THE WRIT

This case presents important issues requiring uniform federal application of the FDIC's "super defenses" in cases of lender liability of failed banks where the borrower is wholly innocent. It requires no citation to authority to say that the crisis in the banking and savings and loan industry has generated an avalanche of litigation, and it is likely that the "super defenses" issue is involved in virtually every takeover of a federally-insured institution. Shepard's Citator currently has twenty-one columns of federal citations to either the case or the statute defining these "super defenses," yet this Court has substantively addressed them but once since their establishment. This Court should establish a uniform rule for the federal courts where a borrower is wholly innocent and is making claims or defenses based on a written agreement.

I.
THE DECISION OF THE FIFTH CIRCUIT IS IN CONFLICT WITH A DECISION OF THIS COURT

Other than to cite it for its holding on the uniform application of federal law, this Court has only discussed the decision in *D'Oench, Duhme v. FDIC*, 315 U.S. 447 (1942) on two occasions.

In *United States v. Yazell*, 382 U.S. 341 (1966), the Court described *D'Oench* as holding, "... that FDIC was entitled to a federal rule protecting it against misrepresentations as to the financial condition of the banks it insures, accomplished by secret arrangements inconsistent with the policy of the applicable federal statutes." *Id.* at 354.

Langley v. FDIC, 484 U.S. 86 (1987), found both the

D'Oench, Duhme doctrine and 64 Stat. 889 [as amended 12 U.S.C.A. § 1823(e)] tied in their applicability to the rule of secret or side agreements, schemes or arrangements likely to mislead banking authorities. *Id.* at 91-92, 92-93.

The note in this case was foreclosed on almost two years before MBank's failure and the FDIC's receivership. There being no suggestion in the record that Triple M or the individuals lent themselves to any scheme or artifice to deceive or mislead bank examiners, and since the Subordination Agreement reflecting the extension of credit complies with all the requirements of 64 Stat. 889 [as amended 12 U.S.C.A. § 1823(e)] should the statute apply, the decision below is in conflict with decisions of this Court.

II.

THE FIFTH CIRCUIT'S APPLICATION OF THE *D'OENCH, DUHME* DOCTRINE, WHERE LENDER LIABILITY WAS BASED ON A WRITTEN INSTRUMENT REQUIRING INTERPRETATION, IS IN CONFLICT WITH TEXAS COMMON LAW OF CONTRACT INTERPRETATION

Triple M's renegotiation of its line of credit at Mbank began in December 1986. All of the parties -- Triple M, Oilwell, and MBank -- were fully aware of what was being negotiated and why. Triple M needed to extend its line of credit from March 3, 1987 to December 31, 1987 to stay in business. Oilwell and MBank wanted Triple M to stay in business, but MBank wanted a more secure position before it would extend Triple M's line of credit. Significantly, the parties' negotiations extended past the line of credit note's

due date without demand or notice.[3]

On the 31st of March, the Subordination Agreement, drafted by MBank, containing the following language, was fully executed.

> NOW, THEREFORE, to induce Bank to extend or continue to extend credit to the Debtor from time to time, and/or make or continue to make loans, advances, payments, or other financial accommodations with and to the Debtor, and in consideration of the premises, the mutual covenants contained herein and the extensions of credit, loans, advances, payments or other financial accommodations made or to be made or continued by MBank to the Debtor, the Debtor and Creditor hereby agree with Bank as follows . . . (R. 456).

The document as a whole can be read to see that Oilwell gave valuable consideration to MBank in return for the bank extending Triple M's $750,000 revolving line of credit note through the end of the year. The reader to make that judgment should have been a jury, however, not the judge.

Since there is no federal rule of contract interpretation in a context such as this [*Vernon v. Resolution Trust Corp.*, 907 F.2d 1101, 1109 (11th Cir. 1990) (deciding the meaning

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[3]The note required notice of acceleration and demand, in writing, by U. S. mail, in the event Triple M did not pay the note when due. [Record ("R") 0221; Tab 8, Record Excerpts below] No demand or notice was made at any time.

of an "acquisition agreement' with the FSLIC)[4]], Texas law must be applied. The Texas rules of contract interpretation require the denial of summary judgment.

If a written instrument is reasonably susceptible to more than one meaning, in Texas extraneous evidence is admissible to determine the true meaning of the instrument and summary judgment is improper. *R&P Enterprises v. LaGuarta, Gavrel, & Kirk*, 596 S.W.2d 517, 519 (Tex. 1980); *see also, City of Pinehurst v. Spooner-Addition Water Co.*, 432 S.W.2d 515, 519 (Tex. 1968).

Significantly, from March 3, 1987 through May 15, 1987 (the day of the offset of Triple M's operating account), both MBank and Triple M treated the revolving credit note as extended and not yet due. In light of the, at worst, ambiguous language of the Agreement, MBank's conduct is a vivid indication of intent and creates an issue not appropriate for summary judgment. *Mapco v. Pioneer*, 615 F.2d 297, 301 (5th Cir. 1980); *Portsmouth Baseball Club v. Frick*, 278 F.2d 395, 400-401 (2d Cir. 1960), *cert. denied*, 364 U.S. 831.

The effect and interpretation of the Subordination Agreement are questions for the jury after it hears the evidence necessary to consider the same in the light of the circumstances surrounding the Agreement's execution. *City of Pinehurst*, 432 S.W.2d at 519.

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[4]*Accord: Fidelity Savings and Loan v. de la Cuesta*, 458 U.S. 141, 174 (1982); *Kaiser Steel Corp. v. Mullins*, 455 U.S.72, 77 (1982).

CONCLUSION

Because the decisions below are in conflict with decisions of this Court and are contrary to the applicable Texas rule of contract interpretation, this Petition for a Writ of Certiorari should be granted. In the alternative, because of the improper grant of summary judgment, the case should be summarily reversed and remanded.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2999

TRIPLE M DRILLING COMPANY,
Plaintiff-Appellant,

versus

FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR MBANK HOUSTON, NATIONAL ASSOCIATION,
Defendant-Appellee.

versus

GARY MORRISON, CAROLYN KATO, CHARLES T. LATHROP, JR. AND CLEO SHOWS,
Intervenors-Appellants.

Appeals from the United States District Court for the Southern District of Texas
(CA-H-89-1511)

(November 19,1991)

Before REYNALDO G. GARZA and GARWOOD, Circuit

Judges and MAHON,* District Judge.

PER CURIAM:[1]

AFFIRMED. See Local Rule 47.6

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*Senior District Judge of the Northern District of Texas sitting by designation.

[1]Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TRIPLE M DRILLING CO.,
Plaintiff,

v. CIVIL ACTION NO. H-89-1511

MBANK HOUSTON, N.A., et al.,
Defendants.

MEMORANDUM AND ORDER

Pending before the Court is the Motion for Summary Judgment of defendant, Federal Deposit Insurance Corporation as Receiver for MBank Houston, N.A. (Docket Entry No. 14) Having reviewed the motion and the opposition of plaintiff and intervenors, the Court concludes that the motion should be GRANTED in part and DENIED in part of the reasons stated below.

A party seeking summary judgment must establish (1) that no genuine dispute exists about any material fact and (2) that the law entitles it to judgment. Fed. R. Civ. P. 56(c); *Thomas v. Harris County* 784 F.2d 648, 651 (5th Cir. 1986). Until the movant has properly supported the motion no response is required. Once this is done the nonmovant must present evidence demonstrating specific, contested facts that are material to the issues requiring adjudication in order to preclude the rendition of a summary judgment. Fed. R. Civ. P. 56(e). Mere allegations or denials are not sufficient.

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986).

Plaintiff, Triple M Drilling Co., asserts six causes of action against defendant: (1) breach of contract, (2) breach of a duty of good faith and fair dealing, (3) fraud, (4) tortious interference, (5) breach of fiduciary duty, and (6) violation of the Texas Deceptive Trade Practices Act. [Plaintiff's First Amended Petition (Docket Entry No. 1A).] The Court concludes that the causes of action asserted for breach of contract, breach of a duty of good faith and fair dealing, fraud, and violation of the Texas Deceptive Trade Practices Act are all barred by the doctrine of *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676 (1942), and by 12 U.S.C. § 1823(e). *See Bell & Murphy Associates v. InterFirst Bank Gateway*, 894 F.2d 750 (5th Cir. 1990). All of these causes of action arise out of the failure of defendant to comply with alleged agreements that were not reduced to writing and recorded as required by *D'Oench Duhme* and § 1823(e).[1]

The Court further concludes that the summary judgment evidence establishes that defendant is entitled to summary judgment on the merits with respect to plaintiff's cause of action for breach of fiduciary duty. Neither the plaintiff's allegations nor its summary judgment evidence shows a confidential or fiduciary relationship between plaintiff or intervenors and defendant that would give rise to such a cause of action under Texas law.

---

[1]Plaintiff concedes that current federal law bars its claims for breach of contract, fraud and DTPA because they are based upon an agreement that does not meet the four requirements of § 1823(e). (Docket Entry No. 22, pp. 6-7)

However, the Court concludes that plaintiff's cause of action for tortious interference with its suppliers and employees is not precluded by the *D'Oench Duhme* doctrine or § 1823(e). This cause of action does not depend upon the validity of the alleged agreements between plaintiff and defendant. Accordingly, plaintiff has a right to pursue this claim to judgment against defendant. *See Campbell Leasing, Inc. v. FDIC*, 901 F.2d 1244 (5th Cir. 1990).

Defendant has also moved for summary judgment as to the claims of intervenors, Gary Morrison, Carolyn Kato, Charles Lathrop, and Cleo Shows. Intervenors allege causes of action for business disparagement, fraudulent misrepresentation, breach of a duty of good faith and fair dealing, and tortious interference with contractual relationships. The summary judgment evidence shows that intervenors are attempting to assert these actions for wrongs committed against Triple M by defendant. None of the intervenors is individually a party to the alleged contracts between Triple M and MBank. The mere fact that intervenors may be shareholders and employees of Triple M does not give them standing to assert any of Triple M's causes of action alleged against MBank. *See Renfro v. FDIC* 773 F.2d 657 (5th Cir. 1985); *Hajdik v. Wingate*, 753 S.W. 2d 199 (Tex App. -- Houston [1st Dist.] 1988), *aff'd* ___ S.W.2d ___ (Tex. 1990). Therefore, the Court concludes that Defendant's Motion for Summary Judgment should be GRANTED as to these causes of action asserted by intervenors.

Additionally, intervenors allege causes of action for defamation and infliction of emotional distress. Like intervenors' other causes of action, these claims are based upon the alleged wrongful offset of the Triple M account, the notice letters sent by MBank to Triple M's creditors, and

related events. After carefully reviewing the summary judgment evidence, the Court concludes that neither intervenors' allegations nor their summary judgment evidence support a cause of action for defamation or negligent or intentional infliction of emotional distress. First, intervenors have not raised a genuine issue of material fact as to whether the notice letters sent by MBank to Triple M's creditors were untrue. In any event, intervenors do not allege that MBank published any disparaging remarks in the letters about any of the intervenors personally. Second, intervenors' allegations are insufficient to contradict MBank's summary judgment evidence that it had a contractual right to offset Triple M's account based on its written agreements with Triple M. The Court therefore concludes that defendant's Motion for Summary Judgment should be GRANTED as to intervenors' causes of action for defamation and infliction of emotional distress.

Conclusion

The Motion for Summary Judgment of defendant, Federal Deposit Insurance Corporation as Receiver for MBank Houston, N.A., is GRANTED as to Triple M's causes of action for breach of contract, breach of a duty of good faith and fair dealing, fraud, violation of the DTPA, and breach of fiduciary duty, and is DENIED as to Triple M's cause of action for tortious interference. Defendant's Motion for Summary Judgment as to the claims of intervenors, Gary Morrison, Carolyn Kato, Charles Lathrop, and Cleo Shows, is GRANTED.

SIGNED at Houston, Texas, this 7th day of August, 1990.

/S/ Sim Lake

SIM LAKE
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Triple M Drilling Co., No. CA-H-89-1511

-vs-

HOUSTON, TEXAS
December 14, 1990
MBANK HOUSTON, N.A., et al. 4:00 p.m.

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE SIM LAKE

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OFFICIAL COURT REPORTER: JEANETTE C. BYERS
PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPH,
TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

THE COURT: Triple M Drilling Company versus MBank Houston, No. 89-1511.

MR. BEERS: Your Honor, Brad Beers for Triple M.

MR. DANIEL: B. D. Daniel for FDIC as receiver for MBank Houston and also Mike Conner for FDIC, Your Honor.

THE COURT: There is under Docket Entry 49 a supplemental memorandum in support of the motion for summary judgment of FDIC receiver. I do not see a response in the file from Triple M.

Was one filed?

MR. BEER [sic]: I believe we were told at the time, Your Honor, we could not file any further response. You gave them leave just to point it out, the matters which you have previously considered in their motion for summary judgment.

THE COURT: Well, I have reviewed the file again and I'm now going to change my mind and grant the FDIC receiver's motion on the remaining claim.

Triple M's remaining claim is that MBank tortuously interfered with contractual relations between Triple M and its customers.

One defense to the acts complained of were that they were privileged because they were done in the bona fide exercise of the bank's own rights. The agreements between MBank and Triple M gave MBank the right to offset Triple M's deposit account and to notify Triple M's customers to send payments directly to the bank. Therefore, I find that the bank as a matter of law had a bona fide right to offset the account and to notify the customers.

The only other allegations in support of this claim in Triple M's complaint is that because of this action it was unable to pay its suppliers.

I conclude that that is an element of its damages. There is no allegation either in the complaint or the other papers that the bank directly interfered between the plaintiff's suppliers and Triple M, only that the lack of money on the part of Triple M kept it from paying its suppliers. So, accordingly, I find that this defense is established as a matter of law and the bank's motion for summary judgment on this claim is granted.

I think that's the last issue in the case.

MR. BEERS: This is, Your Honor.

MR. DANIEL: That's correct, Your Honor. And I think that will permit us now to consolidate the appeals in the Fifth Circuit probably.

THE COURT: Well, I've already entered a 54B judgment as to the individual interveners' [sic] claims.

MR. BEER [sic]: Correct.

THE COURT: I've stricken attempt to intervene, so at least three chances to reverse me on appeal.

Anything else.

MR. BEER [sic]: That's it, Your Honor.

MR. DANIEL: That's it, Your Honor.

THE COURT: Thank you, gentlemen.

I certify that the foregoing is a correct transcript from the record of the proceedings in the above-entitled matter.

JEANETTE BYERS, RPR.
February 18, 1991

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TRIPLE M DRILLING CO., ET AL

VS. C.A. NO. H89-1511

FEDERAL DEPOSIT INSURANCE CORP.
AS RECEIVER FOR MBANK HOUSTON
N.A.

FINAL JUDGEMENT

ON THE 7th day of August, 1990 came on to be heard the Motion for Summary Judgment of defendant, Federal Deposit Insurance Corporation as Receiver for MBank Houston, N.A. The Court, after considering the motion and responses thereto and after hearing the arguments of counsel, GRANTED the motion as to all claims of Intervenors Gary Morrison, Carolyn Kato, Charles Lathrop and Cleo Shows.

Further, the Court finds that, in the interest of justice and fairness, these claims should be severed from the remaining issues in the case pursuant to Fed. R. Civ. P. Rule 54(b), there being no just cause for delay. It is, therefore,

ORDERED, ADJUDGED, and DECREED that the FDIC-Receiver have judgement in its favor and that Intervenors, Gary Morrison, Carolyn Kato, Charles Lathrop and Cleo Shows, take nothing by their claims in this case. It is further,

ORDERED, ADJUDGED, and DECREED that all claims of Intervenors, Gary Morrison, Carolyn Kato, Charles Lathrop, and Cleo Shows, are hereby severed from the remaining issues in the case and made FINAL for all purposes.

SIGNED at Houston, Texas, this 19th day of October, 1990.

/S/ Sim Lake
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TRIPLE M DRILLING CO., et al.,
Plaintiffs,

v. CIVIL ACTION NO. H-89-1511

FEDERAL DEPOSIT INSURANCE
CORPORATION, as Receiver for
MBANK HOUSTON, N.A.,
Defendant.

FINAL JUDGMENT

In accordance with the Court's Orders of August 16, 1990 (Docket Entry No. 28), October 12, 1990 (Docket Entry No. 48), and today, the Court ORDERS and ADJUDGES that plaintiff, Triple M Drilling Co., recover nothing from defendant, Federal Deposit Insurance Corporation, as Receiver for MBank Houston, N.A., and that costs of court be paid by plaintiff.

This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, this 14th day of December, 1990.

/S/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
APR 15 1992
OFFICE OF THE CLERK

(2)

No. 91-1303

In the Supreme Court of the United States

OCTOBER TERM, 1991

TRIPLE M DRILLING COMPANY, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in holding that petitioners' lender liability claims are barred by 12 U.S.C. 1823(e) (Supp. I 1989) and the doctrine of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942).

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In the Supreme Court of the United States

OCTOBER TERM, 1991

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v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-2a) and the district court (Pet. App. 3a-6a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1991. The petition for a writ of certiorari was filed on February 11, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985, petitioner Triple M Drilling Company (Triple M) obtained a revolving credit line (Note) from MBank Houston, N.A. (MBank), where Triple M maintained various operating accounts. Pursuant

to a security agreement, Triple M pledged certain accounts receivable to secure the Note and agreed that any Triple M deposit account at MBank could be set off against Triple M's indebtedness. Triple M purchased drilling equipment from USX Corporation's Oilwell Division (Oilwell), financing these purchases in part by granting Oilwell a lien on Triple M's accounts receivable.

On March 3, 1987, the Note matured by its own terms. On March 25, 1987, Triple M and Oilwell executed a Subordination Agreement under which Oilwell's security interest in Triple M's accounts receivable was subordinated to MBank's security interest in those receivables. The Subordination Agreement's preamble reflects that it was designed "to induce [MBank] to extend or continue to extend credit [to Triple M] from time to time, and/or make or continue to make loans, advances, payments or other financial accommodations." Pet. 9. Nothing in the Subordination Agreement provides for extension of the Note or a new maturity date. To the contrary, the Subordination Agreement expressly reserves to MBank all of its rights against Triple M. Gov't C.A. Record Excerpts 9.

Subsequently, on May 15, 1987, nearly ten weeks after the Note matured, MBank exercised its right under the Note to offset the Triple M deposit account against Triple M's indebtedness; in addition, MBank notified Triple M's debtors to make payments directly to MBank, which was also a right expressly reserved to it under the terms of the Note. Pet. 5-6; Pet. App. 9a.

2. In July 1987, Triple M commenced this litigation in state court, alleging that MBank had orally agreed to extend the Note. Petitioners Gary Morrison, Carolyn Kato, Charles F. Kato, and Cleo Shows,

who were officers of Triple M, intervened on May 12, 1988. Pet. App. 4a-5a. Petitioners' claims against MBank included breach of contract, breach of a duty of good faith and fair dealing, fraud, violation of the Texas Deceptive Trade Practices Act, commercial disparagement, tortious interference with contract, defamation, and intentional infliction of emotional distress. *Id.* at 4a-6a.

In March 1989, MBank became insolvent, and the Federal Deposit Insurance Corporation (FDIC) was appointed its receiver. The FDIC as receiver removed the action to federal court and moved for summary judgment on the ground that petitioners' claims were barred under the doctrine of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and under 12 U.S.C. 1823(e) (Supp. I 1989).[1] The district court granted summary judgment to the FDIC, holding that petitioners' claims were, as relevant here, barred

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[1] Section 1823(e) (12 U.S.C.) provides:

> No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement:
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

by *D'Oench* and Section 1823(e) because they arose out of the failure of MBank to comply with alleged agreements that had not been reduced to writing and recorded in the institution's books and records. Pet. App. 4a.[2]

3. The court of appeals affirmed without opinion. Pet. App. 1a-2a.

ARGUMENT

1. Petitioners do not dispute that, under 12 U.S.C. 1823(e) (Supp. I 1989) and the *D'Oench* doctrine, unwritten agreements may not be the basis for diminishing or defeating the FDIC's interest in petitioners' Note. Pet. 3-4. Petitioners also admit that their entire case depends on the factbound issue whether the terms of the Subordination Agreement extended the maturity date of the Note. *Ibid.* Petitioners simply disagree with the lower courts' conclusion that the terms of the Subordination Agreement did not extend the due date of the Note, and point to no lower court decision that is in conflict with that conclusion. There is accordingly no basis for further review.

Petitioners do not claim that the Subordination Agreement unambiguously extended the maturity date of the Note. They point (Pet. 9), however, to vague language in the Subordination Agreement's

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[2] In addition, the court ruled that the officers lacked standing to bring Triple M's claims for commercial disparagement, fraud, breach of good faith, and tortious interference. Pet. App. 5a. The court also dismissed the officers' claims for defamation and intentional infliction of emotion distress because they were unsupported by either the allegations or the summary judgment evidence. *Id.* at 6a. Finally, the district court dismissed a claim for tortious interference with contract, finding that MBank had a bona fide right under the Note to offset the Triple M account and notify Triple M's customers to send payments directly to the bank. *Id.* at 9a.

preamble, and imply that this extended the due date of the Note; and they claim that it can be inferred, based on the Subordination Agreement as a whole, that the parties intended to extend the Note. Contrary to petitioners' suggestions, the Subordination Agreement did not extend the Note.

During negotiation of the Subordination Agreement, Triple M sought an explicit extension of the Note's maturity date, and MBank refused. See *Triple M Drilling Co.* v. *Seider*, No. 91-2523 (5th Cir. Feb. 18, 1992) (*Triple M II*) (*reprinted*, App., *infra*, 1a-7a).[3] If Triple M and MBank had agreed to such an extension, petitioners would not need to invoke the preamble language of the Subordination Agreement, which merely reflects a design to "induce" MBank to extend or continue to extend credit to Triple M. Nor would they need to claim that the document "as a whole can be read to see" that MBank extended the Note. Pet. 9. Petitioners' arguments are a concession that no agreement to extend the Note was ever executed. In *Triple M II*, the Fifth Circuit interpreted the *same* Subordination Agreement, and ruled that it is unambiguous and "is not an agreement to extend the revolving note." App. 6a.

Even if the Subordination Agreement were ambiguous and could be construed to extend the due date of the Note, petitioners' claims would still be barred by *D'Oench* and 12 U.S.C. 1823(e) (Supp. I 1989). The essence of the *D'Oench* doctrine is that the FDIC is

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[3] In that related case, Triple M brought claims against certain officers of MBank based on the same agreements and events that gave rise to this case. The Fifth Circuit recently held that the claims were, in the main, barred by claim preclusion. In the course of its discussion, the court stated that Triple M "[c]onced[ed] in their pleadings that MBank refused to sign an extension of the revolving note." App., *infra*, 2a; see also *id.* at 7a.

entitled to rely, to the exclusion of any extraneous matters, on the official bank records that set forth the rights and obligations of the financial institution. Accordingly, where bank documents are alleged to raise an inference of an agreement, such an inference will not withstand the federal regulator's *D'Oench* defense. See, *e.g.*, *Clay* v. *FDIC*, 934 F.2d 69, 73 (5th Cir. 1991); *Bowen* v. *FDIC*, 915 F.2d 1013, 1016-1017 (5th Cir. 1990) (the FDIC need not search a failed bank's documents for inferences and hidden duties). Because the Subordination Agreement did not clearly reflect the bank's agreement to extend the Note's due date, petitioners are barred by *D'Oench* from arguing that such an extension was part of that agreement.

Section 1823(e) bars petitioners' claims for the same reason. Petitioners nonetheless demand a trial so that they may attempt to divine an agreement to extend the Note's maturity date from the Subordination Agreement and other "extraneous evidence."[4] Pet. 10. That demand is at odds with the purposes of Section 1823(e).[5] As this Court stated in *Langley* v.

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[4] Petitioners' effort to buttress their arguments by claiming to be "wholly innocent" borrowers is unavailing. The *D'Oench* doctrine applies in the absence of an intent to deceive or defraud banking authorities, in the absence of malfeasance, and where the borrower acted in good faith. *FSLIC* v. *Gordy*, 928 F.2d 1558, 1566-1567 (11th Cir. 1991); *Bowen* v. *FDIC*, 915 F.2d 1013, 1016-1017 (5th Cir. 1990); *Bell & Murphy & Assocs., Inc.* v. *Interfirst Bank Gateway, N.A.*, 894 F.2d 750, 753-754 (5th Cir.), cert. denied, 111 S. Ct. 244 (1990).

[5] Because petitioners' claims are barred by the federal *D'Oench* and Section 1823(e) defenses, they are mistaken in asserting (Pet. 9-10) that Texas common law of contract interpretation entitles them to a trial. In any event, we point out that the *Triple M II* court held that, under Texas law, the Subordination Agreement could not be interpreted to extend

FDIC, 484 U.S. 86, 92 (1987), the "agreement" must be on file in the bank's records at the time of an examination. If it is not, examiners cannot make reliable evaluations of seemingly unqualified notes, such as the Note in the present case, which are later claimed to be subject to undisclosed conditions. See also *Beighley* v. *FDIC*, 868 F.2d 776, 782-783 (5th Cir. 1989). In short, if the agreement is not reflected in "explicit documentation" in the bank's books and records, it is "insufficient as a matter of law" to give notice to the FDIC, and is therefore unenforceable. *FDIC* v. *McCullough*, 911 F.2d 593, 601 (11th Cir. 1990), cert. denied, 111 S. Ct. 2235 (1991).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1992

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the due date of the Note, which is the interpretation offered by petitioners in this Court. App., *infra*, 6a-7a.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2523
Summary Calendar

TRIPLE M DRILLING COMPANY & GARY MORRISON,
PLAINTIFFS-APPELLANTS

versus

KATHRYN SEIDER, ET AL., DEFENDANTS-APPELLEES,
THIRD PARTY PLAINTIFFS

and

THE FEDERAL DEPOSIT INSURANCE CORPORATION
AS RECEIVER FOR MBANK HOUSTON,
THIRD PARTY DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Southern District of Texas
(CA H-90-3823)

(February 18, 1992)

Before POLITZ, Chief Judge, SMITH and EMILIO M. GARZA, Circuit Judges.

POLITZ, Chief Judge: *

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular

Alleging procedural and substantive errors, Triple M Drilling Company and Gary Morrison appeal an adverse summary judgment. Finding no error, we affirm.

Background

Morrison is Chairman of the Board of Directors of Triple M which obtained a line of credit from MBank Houston, N.A., and executed a $750,000 revolving note with a maturity date of March 3, 1987. Triple M secured the note with its accounts receivable and granted MBank the right to set off any deposit accounts against the debt and to notify Triple M's debtors in the event of default. When the note was not paid as required, MBank set off Triple M's accounts. The instant litigation is based on Triple M's interpretation of a subordination agreement executed after the note became overdue and the set off. In this agreement another creditor of Triple M subordinated its security interest in Triple M's accounts receivable to MBank's security interest in those receivables. Conceding in their pleadings that MBank refused to sign an extension of the revolving note, Triple M and Morrison nonetheless claim that the subordination agreement effected such an extension. The subordination agreement contains the following language in a preamble to a list of terms:

> NOW, THEREFORE, to induce [MBank] to extend or continue to extend credit to [Triple M] from time to time, and/or make or continue to make loans, advances, payment or other financial

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cases on the bases of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to the Rule, the Court has determined that this opinion should not be published.

> accommodations with and to [Triple M], and in consideration of the premises, the mutual covenants contained herein and the extensions of credit, loans, advances, payments or other financial accommodations made or to be made or continued by [MBank] to [Triple M] and [the subordinating creditor] hereby agree with [MBank] as follows:

Multiple terms follow. In addition to securing MBank's superior rights in the accounts receivable, the terms provide that MBank may "without impairing or releasing any of [MBank's] rights, . . . change the amount, manner, place or terms of payment of, or change or extend the time of payment of, or renew or alter the Bank Note in any and all respects. . . ."

Triple M filed suit against MBank; MBank subsequently became insolvent. In the suit against MBank the district court held that MBank's breach of contract, breach of good faith and fair dealing, and fraud claims, as asserted against the FDIC as Receiver of MBank, were foreclosed by the doctrine of D'Oench Duhme & Co. v. FDIC, 315 U.S. 447 (1942) and 12 U.S.C. § 1823(e). We affirmed. *See* Triple M Drilling Co. v. MBank Houston, N.A., No. H-89-1511 (S.D.Tex. Aug. 9, 1990), *aff'd*, No. 90-2999 (5th Cir. Nov. 19, 1991); *see also*, Clay v. FDIC, 934 F.2d 69 (5th Cir. 1991) (an inference of a secret agreement in bank documents will not withstand D'Oench Duhme). Triple M filed the instant action for breach of contract, breach of good faith and fair dealing, fraud, and tortious interference against the appellees, former officers of MBank. The appellees in the principle action in turn filed third-party complaints against the FDIC as Receiver for MBank. The district court granted summary judgment for the

bank officers and the FDIC. Triple M and Morrison appeal.

Analysis

Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). We review the district court's grant of summary judgment *de novo*.

Morrison does not have standing to sue for the actionable wrongs committed against Triple M. Renfro v. FDIC, 773 F.2d 657 (5th Cir. 1985); Wingate v. Hajdik, 795 S.W.2d 717 (Tex. 1990). Triple M's claims for breach of contract, breach of good faith and fair dealing,[1] and fraud are barred by claim preclusion. *See* Lubrizol Corp. v. Exxon Corp., 871 F.2d 1279 (5th Cir. 1989). Claim preclusion bars the parties to a prior proceeding, or those in privity with them, from relitigating the same claims that were subject to a final judgment on the merits by a court of competent jurisdiction. Lubrizol. In the first suit against MBank, we affirmed the grant of summary judgment on identical breach of contract, breach of good faith and fair dealing, and fraud claims. Triple M. Drilling Co. v. MBank Houston, N.A., No. H-89-1511 (S.D. Tex. Aug. 9, 1990), *aff'd*, No. 90-

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[1] Regarding Triple M's claim for breach of good faith and fair dealing, we note that in any event, " '[u]nder Texas law there is no general fiduciary obligation between a lender and a borrower or between business parties.' " Clay v. FDIC, 934 F.2d 69, 72 (5th Cir. 1991) (quoting In re Letterman Bros. Energy Secs. Litig., 799 F.2d 967, 975 (5th Cir. 1986), *cert. denied*, 480 U.S. 918 (1987)); FDIC v. Coleman, 795 S.W.2d 706 (Tex. 1990).

2999 (5th Cir. No. 19, 1991).[2] The only difference between the final judgment in the prior suit and the instant litigation is that here Triple M has sued MBank's officers. Because Triple M's claims against the officers are for actions within the scope of their duties as MBank employees, identity of parties exists for purposes of claim preclusion. Lubrizol Corp.

In its tortious interference claim, Triple M argues that MBank interfered with Triple M's ability to conduct business by dishonoring checks and asking debtors to direct payments to MBank. The elements of a cause of action for tortious interferences under Texas law are: (1) a contract, (2) an intentional act calculated to cause damage and interfering with the contract, (3) actual damages caused by the intentional act, and (4) the lack of any justifiable cause or excuse on the part of the defendant. Haralson v. E.F. Hutton Group, Inc., 919 F.2d 1014 (5th Cir. 1990). Triple M argues that MBank lacked a justi-

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[2] The district court in Triple M Drilling Co. v. MBank Houston, N.A. found that breach of contract and good faith, and fraud claims were barred by section 1823(e), but the court allowed a tortious interference claim that did "not depend upon the validity of the alleged agreements." Triple M Drilling Co. v. MBank Houston, N.A., No. H-89-1151, Slip Op. at 3. *See* Campbell Leasing, Inc. v. FDIC, 901 F.2d 1244 (5th Cir. 1990). We do not address whether the tortious interference claim in the first suit is the same one asserted in the instant litigation because Triple M may not bind the bank officers to the first suit. The claim preclusion is non-mutual: The officers, who were not a party to the first suit, are not bound by it. *See generally* C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §§ 4463-64 (1981); *see also* Lubrizol, 871 F.2d at 1289 & n.15. We do not, in any event, address the application of section 1823, as we find summary judgment appropriate on the grounds articulated by the district court.

fiable cause to exercise its rights under the past due revolving note because the subordination agreement had extended the note. We conclude that as a matter of law this claim is not viable.

Triple M relies solely on the agreement's preamble language that it was designed "to induce [MBank] to extend or continue to extend credit to [Triple M]." We agree with the district court that the subordination agreement between MBank, Triple M, and the subordinating creditor is not an agreement to extend the revolving note, which was an existing parallel debt. The meaning of an unambiguous contract is a purely legal question that may be resolved by summary judgment. South Central Bell Telephone Co. v. Canal Place Ltd. Partnership, 927 F.2d 867 (5th Cir. 1991). Whether a contract term is ambiguous is a question of law reviewed *de novo*. Forest Oil Corp. v. Strata Energy, Inc., 929 F.2d 1039 (5th Cir. 1991). A Texas court will deem a contract unambiguous when it is reasonably open to only one interpretation when one considers standard rules of interpretation and the surrounding circumstances. Hanssen v. Qantas Airways Ltd., 904 F.2d 267 (5th Cir. 1990).

The subrogation agreement may not be given the interpretation advanced by Triple M. The preamble language emphasized by Triple M does not identify the note. None of the many terms provide for the note's extension. Further, the agreement does not set, or even reference, a new maturity date. Because the *only* function of an agreement to extend the note would be to set a new due date, the absence of this term would render the alleged agreement, if we took it to be such, indefinite and unenforceable under Texas law. *See* Bank of El Paso v. T.O. Stan-

ley Boot Co., 809 S.W.2d 279 (Tex. App. 1991); University National Bank v. Ernst & Whinney, 773 S.W. 2d 707 (Tex. App. 1989) (citing Moore v. Dilworth, 142 Tex. 538, 179 S.W.2d 940 (1944)) (an agreement must define the terms necessary for its enforcement). Triple M may not ask a jury to supply an essential contract term. Id. Even if we were to find an ambiguity and look beyond the four corners of the document to discern the meaning of the preamble phrase, it is still clear that MBank did not commit to an extension. Triple M stated in its pleadings that MBank expressly refused to sign an extension of the note.

Triple M complains that the district court had instructed it not to file a brief in opposition to the appellee's summary judgment motion. The record reflects that Triple M received notice of and attended a hearing on the summary judgment motion, and was allowed to submit written memoranda with a motion for rehearing. We perceive no error arising out of the matter complained of. Triple M has not identified any relevant evidence it was not permitted to introduce nor has it pointed to any error of law about which we are persuaded. Triple M has, therefore, not acquitted its burden of identifying a reversible error on appeal.

For the reasons assigned, the district court is AFFIRMED.

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